IN THE

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 788.

SAMUEL BROTHERS AND COMPANY, a Corporation, Appellant,

vs.

THE HOSTETTER COMPANY, a Corporation, Appellee.

Remonstrance to Appellant's Petition for Rehearing.

A. H. CLARKE,
E. E. GALBRETH,
Solicitors for Appellee.

Smith Bros., Franklin Print, 405 Grant Street, Pittsburg.

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To the Honorable, the Judges of said Court:

Appellee remonstrates against the granting of said petition for the following reasons:

It is not founded upon any newly discovered evidence.

In the Court below, and also in this Court, the case was fully argued, and by appellant's counsel to that extent that he occupied more than the time allowed, and had to be called down.

There is no new matter disclosed in the petition other than dwelt upon in the petitioner's briefs and arguments, save that petitioner is a Hebrew, (which may be inferred from his name), and that there was some talk of a com-

promise, neither of which, it would seem, are of much moment, one way or the other.

When the appeal was taken the case was before the Master for the assessment of the damages, and the call by complainant upon defendant for production of books and accounts, may possibly have had some effect in accelerating said appeal, since it may have been shown that far greater sales were made than stated in said petition.

The statement that appellee "tendered offers of settlement" is untrue; yet had it occurred, what reason would that be for a rehearing of this case? We have yet to learn that any offer of compromise in a suit pending can be made use of by either party.

The statement that "appellee is defrauding the U. S. Government" is too absurd for comment. Why does not the distinguished Mr. Countryman, or Gardner, appear before a grand jury and have appellee indicted?

By Mr. Galbreth:

This cause was tried with a number of others, and we feel that the distinguished Circuit Judge reached a just, legal and equitable conclusion, for of all the causes then tried, none showed more facts of flagrant disregard of the rights of appellee, or a more brazen transgression in the field of "unfair competition" than does this cause.

Certainly, if the Court could have observed these two witnesses, Morrison and McEvers, while they were giving their testimony on behalf of appellee, they would have agreed that there were two conscientious witnesses, who endeavored and succeeded in telling the truth, the whole truth and nothing but the truth; and these two witnesses gave their testimony with the knowledge that appellent, through its counsel, had repeatedly declared and threatened, before any testimony in the cause had been given, that if any witnesses testified to facts which would support

the allegations of the Bill of Complaint filed in the action, they would be promptly prosecuted for perjury; yet these two witnesses, with such knowledge, as truthful and honorable citizens, which they were and are, ignored the threats against them, and carefully and truthfully narrated the facts of the transactions of the sales and the conversations; and furthermore, each of these witnesses is the peer in character of any officer, or the counsel of appellant, and we feel quite sure neither of them could be induced to carry into litigation a threat which, apparently has for its object the determent or intimidation of witnesses in the matter of giving their testimony to be used in a cause pending in a court of justice. It is always unpleasant for a lawyer to criticise his opponent. Appellant complains of this prosecution because, as counsel for appellant says, "the amount of bitters appellant sold was about ($70.00); seventy dollars per year." The greatest damage done to appellee is the putting on the market, as and for "Hostetter Bitters," a cheap, miserable concoction, which educates the public into the belief that appellee's goods are not a good, helpful, medicinal preparation, but is harmful, while the fact is, the genuine goods are conclusively proved to be helpful and not harmful to the consumers thereof.

There is so much stated in appellant's petition for rehearing which is *dehors the record*: and seems so childish, that it is hard for one to believe that a lawyer ever consented to endorse the statements contained therein.

Appellant had a fair trial, and was given an attentive and patient hearing, by both the lower court and this honorable court, and should be satisfied, and quietly submit to the impartial and just judgment of two competent and able courts, and not continue to act, like a spoiled child which has been forbidden entrance to the room, stand outside and kick the door.

The findings of fact and the conclusions of law in this case are surely correct and sound.

Respectfully submitted,

A. H. Clark,
E. E. Galbreth,
Solicitors for Appellee.

Pittsburgh, January 2, 1903.